Supreme Court, U.S.
FILED

961250 DEC 18 1996

No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

GREG FORT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

DOUGLASS C. HOCHSTETLER
Counsel of Record
MARSHALL, O'TOOLE, GERSTEIN,
MURRAY & BORUN
6300 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
(312) 474-6300

December 17, 1996

QUESTIONS PRESENTED

Should clear and convincing evidence be required to support a factual determination at sentencing which dramatically increases the sentence mandated by the Federal Sentencing Guidelines?

Where the mandatory minimum sentence for a 22-year old participant in a drug conspiracy is either a 28-year jail term or life imprisonment, and the choice of sentence depends upon whether or not the cocaine distributed by the petitioner included a threshold quantity of "crack" type cocaine, should the district court require clear and convincing evidence that the threshold amount of crack cocaine was involved before imposing a life sentence?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

I. THIS CASE ILLUSTRATES THE TURMOIL EXISTING BETWEEN AND WITHIN CIRCUITS ON THE FIRST QUESTION PRESENTED 8

II. THE ISSUES PRESENTED BY THIS PETITION ARE IMPORTANT TO THE ADMINISTRATION OF JUSTICE 11

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Addington v. Texas,
441 U.S. 418, 99 S. Ct. 1804,
60 L. Ed. 2d 323 (1979) 14

Cooper v. Oklahoma,
-U.S.-, 116 S.Ct. 1373,
134 L.Ed.2d 498 (1996) 14

Kinder v. United States,
504 U.S. 946, 112 S. Ct. 2290,
119 L. Ed.2d 214 (1992)
(White, J., dissenting) 9, 10, 11

McMillan v. Pennsylvania,
477 U.S. 79, 106 S.Ct. 2411,
91 L.Ed.2d 67 (1986) 9, 14

United States v. Bailey,
97 F.3d 982 (7th Cir. 1996) 11

United States v. Baylor,
97 F.3d 542 (Wald, J., concurring) 12

United States v. Evans et al.,
92 F.3d 540 (7th Cir. 1996) 1

United States v. Kikumura,
918 F.2d 1084 (3d Cir. 1990) 9, 10, 11

United States v. Lacey,
86 F.3d 956 (10th Cir.), cert denied
--U.S.--, 117 S.Ct. 331 (1996) 12

United States v. Masters,
978 F.2d 281 (7th Cir. 1992),
cert. denied 508 U.S. 906, 113 S.Ct. 2333,
124 L.Ed.2d 245 (1993) 10, 11

United States v. Patriarca,
912 F. Supp. 596 (D. Mass. 1995) 9

United States v. Restrepo,
946 F.2d 654 (9th 1991),
cert. denied 503 U.S. 961, 112 S. Ct. 1564,
118 L. Ed. 2d 211 (1992) 10

United States v. Rodriguez,
67 F.3d 1312 (7th Cir. 1995),
rehearing denied 73 F.3d 161 (7th Cir.),
cert. denied -U.S.-, 116 S.Ct. 1582,
134 L.Ed.2d 679 (1996) 10, 11

United States v. Seale,
20 F.3d 1279 (3d Cir. 1994) 11

United States v. Townley,
929 F.2d 365 (8th Cir. 1991) 10

United States v. Washington,
11 F.3d 1510 (10th Cir. 1993),
cert. denied --U.S.--, 114 S. Ct. 1404,
128 L. Ed. 2d 76 (1994) 10

STATUTES

18 U.S.C. §3231 2

28 U.S.C. §1254(1) 1

21 U.S.C. §§841, 846 3

MISCELLANEOUS

Amendment V, United States Constitution 1, 9

U.S. Department of Justice,
Office of Justice Programs, Bureau
of Justice Statistics,
Sentencing in Federal Courts:
Does Race Matter? (1993) 13

United States Sentencing Commission,
Cocaine and Federal Sentencing Policy,
(February 1995) 12, 13

United States Sentencing Commission,
Guidelines Manual, §2D1.1(a) 1, 3

United States Sentencing Commission,
Guidelines Manual, §2D1.1(c) 1, 4, 7

OPINION BELOW

The United States Court of Appeals for the Seventh Circuit affirmed the indigent petitioner's conviction and sentence of life imprisonment in an opinion reported as *United States v. Evans et al.*, 92 F.3d 540 (7th Cir. 1996) (per Posner, C.J.). The opinion is reprinted in the appendix. (A 1-15).

JURISDICTION

The judgment of the U.S. Court of Appeals was entered on August 9, 1996. A timely petition for rehearing, with suggestion for rehearing *en banc*, was denied on September 19, 1996. (A 16). This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V, United States Constitution:

> No person shall . . . be deprived of life, liberty or property, without due process of law . . .

United States Sentencing Commission, Guidelines Manual, §2D1.1(a)(3) and (c)(3) (Nov. 1993):

(a) Base offense level (Apply the Greatest):

* * * * *

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

* * * * *

(c)(3) Base offense level 38

* * * * *

At least 150 KG . . . of Cocaine . . .
At least 1.5 KG . . . of Cocaine Base . . .

* * * * *

STATEMENT OF THE CASE

The petitioner was sentenced to life in prison for participating in a 19-person conspiracy to distribute cocaine and cocaine base (crack cocaine) in Rockford, Illinois. (A 2). The U.S. District Court for the Northern District of Illinois (Western Division) had subject matter jurisdiction under 18 U.S.C. §3231, the case arising from charged

offenses against the laws of the United States, 21 U.S.C. §§ 841, 846.

The petitioner was 20 years old when he was arrested and held without bond pending a jury trial at which he was ultimately found guilty. At sentencing, the district court found the petitioner (then age 22) had been part of the conspiracy's leadership group, which was nicknamed the "Mob." (A 2, 22-26). Another member of the Mob was the petitioner's mother, Helen Fort. (A 2). The district court concluded that, as one of the leaders of the conspiracy, the petitioner was jointly responsible (along with the other Mob members[1]) for the entire volume of cocaine distributed by the conspiracy. (A 26). Accordingly, in order to calculate the petitioner's "base offense level" under the United States Sentencing Guidelines (USSG), §2D1.1(a)(3), the district court estimated the quantity and type of cocaine distributed by the entire conspiracy. (A 26).

Estimating the quantity of drugs distributed by the conspiracy was "not an easy task," according to the district court, because the Government did not seize large quantities of cocaine or crack. (A 26).[2] The district court conse-

---

[1] The Court of Appeals' opinion states that there were seven Mob members in the 19-person conspiracy (A 2), but that statement reflects a misunderstanding of the evidence. In fact, there were 11 Mob members in the 19-person conspiracy.

[2] The largest seizure of crack involved 943 grams. There was conflicting evidence regarding whether this crack cocaine belonged to the Mob, and the district court made a point of noting that "by a preponderance of the evidence" the kilo appeared to be a "Mob stash." (A 32).

quently adopted the Government's suggestion to use a "supply side approach" (A 19), and approximated the quantity of cocaine *distributed* by estimating the quantity *purchased* by the conspiracy. The district court estimated that the conspiracy had purchased 23 kilos of cocaine, 19 of which were bought after the conspiracy started selling crack. (A 26-35).

One difficulty with the supply side approach was that it could not distinguish between cocaine that was simply repackaged for distribution, and cocaine that was "cooked" by the conspirators to form crack. The two forms of cocaine are punished far differently: generally speaking, 1 gram of crack cocaine merits the same sentence as 100 grams of powder cocaine. See USSG §2D1.1(c). Accordingly, in sentencing the defendant, the district court relied upon the testimony of two conspirators (Donald Box and Decarles McGhee, who testified pursuant to plea agreements) as the basis for estimating that 50% of the cocaine was cooked and then distributed in the form of crack during the latter stages of the conspiracy. (A 31, 34).

Based on that 50% estimate, the court calculated that the conspiracy had distributed 9½ kilograms of crack (A 35), leading to a base offense level which (after sentencing enhancements) made a sentence of life imprisonment mandatory.[3] (See A 38). Although the district judge then

---

[3] The district court calculated a base offense level of 40 in accordance with the Sentencing Guidelines in effect at the time of the October 27, 1994 sentencing hearing. On November 1, 1994, the (continued...)

fulfilled his duty to impose the sentence required by his calculations, he made clear at the sentencing hearing that he thought the sentence was excessive:

> . . . I face having the obligation to impose a life sentence on someone who hasn't killed anybody, who hasn't got a prior felony record, and who hasn't engaged in any criminal convictions that show me that he is a person that normally is one who should spend the rest of his life behind bars. (A 39-40).

Inexplicably, two weeks before defendant's sentencing hearing, the same district court had rejected the testimony of Box and McGhee as a basis for estimating the amount of crack cocaine distributed by the conspiracy. This occurred

---

[3](...continued)
Guidelines were changed so that the highest possible base offense level became 38 (a later version of the Guidelines made the change retroactive at the discretion of the trial court). The district court signed the judgment on November 2, and the judgment was entered on November 4. The Court of Appeals held that the date of the sentencing hearing rather than the date of entry of judgment controlled as to which version of the Guidelines was applicable (the Court of Appeals ignored the point that the district court did not sign the judgment until November 2). As a practical matter, however, it does not make any difference for this defendant whether the base offense level is 38 or 40 because, with the six points of sentencing enhancements imposed on the defendant, even a base offense level of 38 leads to a point total (after enhancements) at 44. Life imprisonment is mandatory at 43. Consequently, in this petition, the focus is on the base offense level of 38, because it is at that base offense level that life imprisonment is mandatory.

during the sentencing hearing for Helen Fort. Helen had dropped out of the Mob for a time, but returned to participate in the conspiracy between May 1993 and July 1993. (A 43). In addition to her conviction for conspiracy, Helen was convicted in a separate count of distributing 41 grams of crack. The Government urged the district court to hold Helen responsible for all drugs distributed by the conspiracy in the May-July 1993 period (because she was then once again a Mob member), and to estimate the amount of crack cocaine that was distributed by the conspiracy using the testimony of Box and McGhee. (See A 43). The district court first ruled that Helen should not be held jointly responsible with the other Mob members for the conspiracy's drug volume during that period. (A 45-46). The court then went on to note that, in any event, the testimony of Box and McGhee was insufficient to serve as the basis for estimating the type of cocaine distributed by the conspiracy:

> ...I might say that my ruling in this case, not only would it be difficult for me to compute the amount, other than the 41 grams, but *it would be pure speculation as to whether it's cocaine or crack cocaine*. Box's general testimony was that, well, it was mostly crack cocaine. The testimony of McGhee is, well, we sold both cocaine and crack cocaine. So, those are difficult matters that I may have to face in

> another sentencing... (A 46; emphasis added).

During oral argument before the Court of Appeals, defendant's counsel conceded (notwithstanding the district court's "pure speculation" language) that there was a bare preponderance of the evidence to support the district court's finding as to the petitioner's base offense level, but urged that the finding was not supported by clear and convincing evidence. (A 12). The Court of Appeals agreed the concession was proper, but declined to decide whether clear and convincing evidence was required. *Id.* Although the Court of Appeals offered the rationalization that a different standard of proof may not have made any difference, the appeals court never mentioned the district court's own words (quoted above) which so strongly suggest that a different standard of proof could have made all the difference in the world for this petitioner.

For petitioner, the finding at sentencing that petitioner was responsible for the distribution of 9½ kilos of crack (A 35) condemned him to life in prison. Under the Sentencing Guidelines, if all 23 kilos of purchased cocaine were repackaged, the base offense level would be 34, which would lead (with the six points of enhancement) to a sentencing range of 30 years to life.[4] Even if some of this

---

[4] The district court found the petitioner carried a gun during his involvement in the conspiracy (which leads to an additional two sentencing points). The sentencing court also found that petitioner was

(continued...)

purchased cocaine was "cooked" and distributed in the form of crack (as the record supports, because there were some seizures of crack by police), a life sentence is not mandatory unless a threshold quantity of crack (1.5 kilos) is met.[5] A finding that more than this threshold quantity of crack was distributed is the finding that converted a mandatory minimum sentence which would free petitioner when he is 50 years old, into the mandatory sentence of life imprisonment which the district court believed unjust. (See A 39-40).

REASONS FOR GRANTING THE WRIT

I. THIS CASE ILLUSTRATES THE TURMOIL EXISTING BETWEEN AND WITHIN CIRCUITS ON THE FIRST QUESTION PRESENTED

Certiorari is appropriate to resolve a conflict among the circuits on the issue of when, if ever, the standard of proof at sentencing should be clear and convincing evidence rather

---

[4](...continued)
a "leader" of a conspiracy, which adds four more points. A base offense level of 34, plus the six added points, gives a point total of 40. The court further found the defendant fell within Criminal History Category III. A level of 40, for a person falling in Criminal History Category III, leads to a sentencing range of 360 months to life under the Sentencing Guidelines.

[5] A quantity of 1.5 kilos of crack translates to a base offense level of 38. Adding the extra six points to this base offense level gives a sentencing total of 44 points. At 43 points, as noted above in footnote 3, life imprisonment is mandatory.

than a mere preponderance. As Justice White observed in dissenting from the denial of certiorari in *Kinder v. United States*, 504 U.S. 946, 112 S.Ct. 2290, 119 L.Ed.2d 214 (1992), this is a matter on which guidance from this Court is warranted.

The uniform view among the Courts of Appeals is that the preponderance of the evidence standard generally satisfies the requirements of due process at sentencing, a view which is in line with controlling precedent, *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 119 L.Ed.2d 214 (1986). *McMillan* left open the possibility, however, that a higher standard of proof might be called for when sentencing findings had an extreme effect on the sentence. See 477 U.S. at 88 ("The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense."). To date, the question of whether due process requires the higher standard of proof for any sentencing findings remains "open." *United States v. Patriarca*, 912 F.Supp. 596, 609 (D. Mass. 1995).

The leading post-*McMillan* case is the Third Circuit's decision in *United States v. Kikumura*, 918 F.2d 1084, 1098-1102 (3d Cir. 1990) (Becker, J.), which held that clear and convincing evidence was required by the Due Process Clause to support findings that converted a defendant's sentence from 30 months to 30 years. Two other circuits (the Eighth and Ninth) have likewise suggested that a clear and convincing standard may be appropriate for findings that

have a dramatic effect on the sentence.[6] Another circuit (the Tenth), while rejecting *Kikumura*, admitted that there were "strong arguments" in favor of the higher standard of proof.[7] The decisions of the Third, Eighth and Ninth Circuits are discussed in Justice White's opinion in *Kinder*. See 112 S.Ct. at 2291-92, 119 L.Ed.2d at 215-16.

The Seventh Circuit has taken a position contrary to *Kikumura*. In *United States v. Masters*, 978 F.2d 281, 286 (7th Cir. 1992), the Seventh Circuit criticized the holding of *Kikumura*, saying "it is impossible to square such a holding with *McMillan*." *Id.* More recently, in a case involving an increase in sentence that the court recognized was comparable to the increase in *Kikumura*, the use of the clear and convincing evidence standard was rejected. See *United States v. Rodriguez*, 67 F.3d 1312, 1322-23 (7th Cir. 1995), rehearing denied 73 F.3d 161 (7th Cir. 1996).[8] A petition for rehearing en banc was denied in *Rodriguez*, with five judges dissenting. See 73 F.3d at 161. According to the opinion dissenting from the denial of rehearing en banc, the

---

[6] *United States v. Townley*, 929 F.2d 369-70 (8th 1991); *United States v. Restrepo*, 946 F.2d 654, 661 n. 12 (9th 1991) (en banc), cert. denied 503 US --, 112 S.Ct. 1564, 118 L.Ed.2d 211 (1992); *Restrepo*, 946 F.2d, at 661-663 (Tang, J., concurring), *id.*, at 664-679 (Norris, J., dissenting).

[7] See *United States v. Washington*, 11 F.3d 1510, 1516 (10th Cir. 1993), cert. denied --U.S.--, 114 S.Ct. 1404, 128 L.Ed.2d. 76 (1994).

[8] *Rodriguez*, unlike *Masters*, did not absolutely foreclose the theoretical possibility that *Kikumura* might have application in some future case. See 67 F.3d at 1323.

Seventh Circuit should have addressed the "difficult and important question" of whether clear and convincing evidence is required where a finding at sentencing leads to life imprisonment rather than a much shorter prison term. See *id.* at 162-63.

In the present case, the panel reasoned that it should refuse to address that difficult and important question because the petition for rehearing en banc had been declined in *Rodriguez*. (A 12). This refusal had the practical effect of silently following *Masters* and rejecting *Kikumura*. The rift between the Third and Seventh Circuits shows no signs of being resolved in the foreseeable future.[9] The present case thus reflects a circuit conflict, and presents this Court with an opportunity to resolve that conflict.

II. THE ISSUES PRESENTED BY THIS PETITION ARE IMPORTANT TO THE ADMINISTRATION OF JUSTICE

As noted by Justice White in *Kinder* -- "[t]he burden of proof at sentencing proceedings is an issue of daily importance to the district courts, with implications for all sentencing findings . . ." 112 S.Ct. at 2292, 119 L.Ed.2d at 216. This general importance of the burden of proof to sentencing

---

[9] The Third Circuit is continuing to follow *Kikumura*. See *United States v. Seale*, 20 F.3d 1279, 1288-89 (3d Cir. 1994). The Seventh Circuit is continuing its refusal to revisit the issue. See *United States v. Bailey*, 97 F.3d 982, 985 (7th Cir. 1996)(panel will not reopen issue which the full court declined to examine in *Rodriguez*).

findings is illustrated by the current furor over the use of acquitted conduct to enhance a defendant's sentence. See generally, *United States v. Baylor*, 97 F.3d 542, 549 (Wald, J., concurring)(characterizing concurring and dissenting opinions on the issue as "bordering on outrage").[10] Another example is the present case, as shown by the district court's comments during the sentencing hearing of petitioner and his mother.

Overlaid against the general importance of the burden of proof at sentencing is the racially disparate impact of the substantial penalty differential between offenses involving crack and powder cocaine.[11] As noted above, there is a 100-1 ratio between the quantity of cocaine which mandates a life sentence, and the quantity of crack which requires that same sentence.[12] An amazing percentage, 88.3%, of crack cocaine offenders are African-American. United States Sentencing Commission, Cocaine and Federal Sentencing

---

[10] The furor has its roots in the use of the preponderance standard of proof at sentencing. Under prevailing circuit precedent, a district court may increase the severity of a defendant's sentence for a crime of which he was convicted, by taking into account "relevant conduct" which can include a crime for which the defendant was acquitted. See, e.g., *United States v. Lacey*, 86 F.3d 956, 968 (10th Cir. 1996), cert. denied -U.S.-, 117 S.Ct. 331 (1996)(". . . although certain evidence may not suffice to establish criminal liability under the reasonable doubt standard, that same evidence may nevertheless support a sentence enhancement under the less rigorous preponderance standard").

[11] Petitioner, like his fellow Mob members, is African-American.

[12] The 100-1 ratio also holds true for shorter prison terms.

Policy, (February 1995) at page 156. According to one study, this predominance of black Americans in crack-related crime, coupled with the heavier penalties for those crimes, together constitute the main reason why prison terms for black defendants are longer than for white defendants. *Id.* at 162, quoting U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Sentencing in Federal Courts: Does Race Matter? (1993) at 1. See also *id.* at 163 ("The 100-1 crack cocaine to powder cocaine quantity ratio is a primary cause of the growing disparity between sentences for Black and White federal defendants.").

Petitioner is not questioning the authority of Congress to establish the 100-1 ratio, nor the authority of Congress to reject the Sentencing Commission's recommendation last year that the 100-1 ratio be abolished. See Federal Sentencing Guidelines Manual (November 1995) at IX. To establish and maintain the 100-1 ratio reflect a policy choice that is the province of the legislative branch.

The judiciary has the authority and responsibility, however, to determine whether individuals hauled into court are subject to the dramatically more severe penalties which result from this policy choice. This responsibility is owed not only to the affected individuals, but also to society at large. The responsibility is especially grave when those severe penalties are being disproportionately imposed on members of a historically disadvantaged minority.

At sentencing, as in any proceeding where a system of justice depends upon human beings, there is a risk that

errors in fact finding will occur. "A heightened standard does not decrease the risk of error, but simply reallocates that risk between the parties." *Cooper v. Oklahoma*, -U.S.-, 116 S.Ct. 1373, 134 L.Ed.2d 498, 513 (1996). The preponderance standard allocates the risk of error in roughly equal fashion, reflecting societal indifference to the outcome of the proceeding. See generally *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). The Seventh Circuit's approval of the preponderance standard here thus implies an indifference to the possibility that petitioner (and other African-Americans) is being unjustly incarcerated for additional decades because of errors in crack-related factfinding.

McMillan should not be read as requiring such unseemly indifference, and it need not be. At issue in *McMillan* was a statute that established five years as the minimum term of imprisonment for certain felonies if the sentencing court found that the defendant had "visibly possessed a firearm" during the commission of the felony. At issue here is a much more significant finding: the finding by the sentencing court that the requisite amount of crack was involved *added about 20-25 years* (depending on life expectancies) to the term of incarceration. Thus *McMillan*, contrary to the Seventh Circuit's view, need be no impediment to the Third Circuit's conclusion that due process requires clear and convincing evidence for sentencing findings that have a dramatic effect on the sentence imposed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DOUGLASS C. HOCHSTETLER
Counsel of Record
233 South Wacker Drive
6300 Sears Tower
Chicago, Illinois 60606
(312) 474-6300

December 17, 1996